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November 20, 2014

NOTICE OF CHANGE TO TEXT AS ORIGINALLY PROPOSED

Involuntary Psychiatric Medication

The full text of the amendments to California Code of Regulations (CCR) that concern Involuntary Psychiatric Medication is provided in its original single underline and strikethrough format. Changes to the original text, which are being proposed in this Notice, are indicated by **bold double underline** for added text and ~~**bold double underline**~~ for deleted text. In addition to text changes, amendments are made to the following three existing forms: CDCR MH-7363, CDCR MH-7366 and CDCR MH-7368, and the inclusion of three new forms: CDCR MH-7363-B, CDCR MH-7368-B, and CDCR MH-7369 which are being incorporated by reference into these regulations.

These revisions/accommodations are made largely in response to public comments received during the initial 45-day public comment period that ended on September 8, 2014. These proposed changes are being made available for public comment.

The attached text and forms contain the following changes:

Subsection 3351(e) is amended to establish the acronym for Penal Code (PC) as the first occurrence throughout the proposed text.

Subsection 3364(a) is amended to delete the phrase, "and shall be provided in ways that are least restrictive of the personal liberty of the inmate." New language regarding the use of less restrictive alternatives is added under Subsection 3364.1(a)(8). These changes are made as a result of public comment.

Subsection 3364(b) is amended to remove the words "provided that" and replace them with the words "as follows." This change is intended to make the sentence read clearly and correctly.

Subsection 3364(b)(1) is amended to delete the entire portion of text which was originally noticed to the public. New language is added to clarify who should alert custody staff that an order for involuntary medication is being implemented. In addition, the new language provides clarification on the process to be followed in the event that an inmate-patient develops side effects from the medication. This subsection has been scrutinized by the California Department of Corrections and Rehabilitation (CDCR) Mental Health Division as well as California Correctional Healthcare Services, and represents an operational procedure that reflects how their respective management structures would like the two units to work together at the institutional level.

Subsection 3364(b)(3) is amended to delete the reference to "Triage and Treatment Area (TTA)" in response to public comment on portions of this subsection. This subsection has been scrutinized by the CDCR Mental Health Division and California Correctional Healthcare Services, and represents an operational procedure that reflects how their respective management structures would like the two units to work together at the institutional level.

Subsection 3364(c) is amended to restore language which refers to the requirement that clinicians record the reason for administration of medication. This is in response to public comment and was reviewed with California Correctional Healthcare Services, including nursing executives, who supported the language to

include the reason for administration of medication as good clinical practice. In addition, “medical and mental health executives” is added to replace the named executive titles, as those are subject to change over time. These changes are made as a result of public comment.

Subsection 3364.1(a)(2) is amended to delete references to “substantial” before the words “physical harm.” This was a drafting error in the text which was originally noticed to the public.

Subsections 3364.1(a)(5)(A), 3364.1(a)(5)(E) and 3364.1(a)(5)(H) related to “informed consent” are amended to delete language in subsections 3364.1(a)(5)(A) and 3364.1(a)(5)(E) which pertains to “an inmate’s rational thought process,” since this language points towards the definition of capacity. Also, deleted from subsection 3364.1(a)(5)(H) was language pertaining to “consistency of choice,” since this language points towards the definition of capacity. These changes are made as a result of public comment.

Subsection 3364.1(a)(5)(I) is adopted to include language to clarify that one component of the definition of informed consent is capacity to consent to treatment.

Subsection 3364.1(a)(7) is amended to change the heading from “Incapacity to Refuse Medication” to “Capacity or Lack of Capacity.” In addition, the language has been revised to provide clarification as to the four elements needed for capacity, in response to public comment received. The four elements comprising capacity are taken directly from an American Psychological Association research study, as cited below. That study reports on a project designed to develop reliable and valid information with which to address clinical and policy questions regarding mentally ill persons' abilities to make decisions about psychiatric treatment.

Four legal standards for determining decision-making competence are described in the relied-upon study: the abilities to communicate a choice, understand relevant information, appreciate the nature of the situation and its likely consequences, and rationally manipulate information. Research related to mentally ill persons' capacities regarding these matters is reviewed. Principles underlying the design of the MacArthur Treatment Competence Study are described. The MacArthur Treatment Competence Study I: Mental illness and competence to consent to treatment. *Law and Human Behavior*, 19(2), 105-126. doi:10.1007/BF01499321. Copyright © 1995 by the American Psychological Association. Reproduced with permission. (<http://dx.doi.org/10.1007/BF01499321>). These factors have been recognized in *Riese v. St. Mary's Hospital and Medical Center* (1987) 209 Cal.App.3d 1303 and *In re Conservatorship of Burton* (2009) 170 Cal.App.4th 1016. This study will be incorporated into the proposed regulations as a report relied upon.

Subsection 3364.1(a)(8) is amended to delete the words “is incompetent” and replace with “lacks capacity.” Also deleted is the portion of the sentence that reads, “or lacks the capacity to accept or refuse medication as defined herein.” These changes are made for added clarity. In addition, language was added in response to comments received, to clarify that involuntary medication should be used after less restrictive alternatives have been evaluated and found clinically inappropriate.

Subsection 3364.1(a)(10) is adopted to add language to provide a definition for “elevated chronic risk” in response to public comment which stated that the definitions for “danger to others” and “danger to self,” as defined in subsections 3364.1(a)(2) and (3), should apply only in the event of immediate danger. The Department has determined that the Legislature intended to create a two-track process (emergency and non-emergency petitions) that differs from the precedent relied upon by the commenter. As such, the Department needs to identify, with as much specificity as possible, the criteria for identifying and routing a case for immediate intervention (emergency petition), or for more measured intervention (non-emergency petition) which considers the level of risk presented by the patient.

Subsection 3364.1(a)(11) is adopted to add language to provide a definition for “imminent risk” in response to public comment which stated that the definitions for “danger to others” and “danger to self,” as defined in subsections 3364.1(a)(2) and (3), should apply only in the event of immediate danger. The Department has determined that the Legislature intended to create a two-track process (emergency and non-emergency petitions) that differs from the precedent relied upon by the commenter. As such, the Department needs to identify, with as much specificity as possible, the criteria for identifying and routing a case for immediate intervention (emergency petition), or for more measured intervention (non-emergency petition) which considers the level of risk presented by the patient.

Subsection 3364.2(a) and (b) are amended to update revision dates on forms used by the involuntary medication program. In addition, reference is made to two newly-created forms: Involuntary Medication Notice: ADD-A-PAGE, CDCR MH-7363-B (09/14) and Renewal of Involuntary Medication Notice: ADD-A-PAGE, CDCR MH-7368-B (09/14). These forms are being incorporated by reference into these regulations. This is a clerical change to reflect that these new forms have been created after the proposed regulations were originally published, and were created due to limitations on space on the existing form and the way that PDF forms accept typed input.

Subsection 3364.2(g) is amended to add language to clarify the role of the Office of Administrative Hearings and management of appointed and retained counsel. This language was also added to provide clarification of the role of the appointed ALJ in the involuntary medication hearing process.

Subsection 3364.2(i) is amended to remove the term “Administrative Law Judge” and replace it with “ALJ,” as this acronym has been defined in previous text. Also, language was added to the day-of-hearing procedures for inmates. The Department is adding language to this subsection based upon input from ALJs and inmate attorneys. This is necessary in order to ensure a uniform practice statewide to have the ALJ deputize a suitable person under oath to interview an inmate for a knowing and intelligent waiver of presence at hearing.

Subsection 3364.2(j) is amended to remove the portion of language that reads, “where the inmate is located” and replace it with “or facility designated in the petition that has been served on the inmate.” The Department received feedback from ALJs and inmate attorneys indicating that some inmates may have a hearing held at a local community hospital or a county jail, and that the proposed language was too restrictive. Accordingly, the subsection was changed to note that the hearing will be held at the facility noticed in the petition.

Subsection 3364.2(k)(1) is amended to revise language to insert the phrase “medical doctor” which was inadvertently left out of the original text due to a drafting error. The Department received feedback from a variety of sources that inmates may go out to the hospital for any medical reason, and in the event the Department needs to establish the reason for the inmate’s non-appearance at a hearing, a medical internist (as opposed to a mental health specialist) may be best suited to provide that information. Accordingly, the subsection was changed to broaden the type of witness who can attest to the reason for an inmate’s medical absence.

Subsection 3364.2(k)(2) is amended to revise the portion of text which makes reference to use of a “neutral” CDCR employee and replaces it with the use of a “sworn” person, as delegated by the ALJ. In addition, the word “impartial” is removed. The Department received feedback from ALJs and inmate attorneys that the use of a sworn person was a better practice to use when making an inquiry into an inmate’s competence or taking a knowing or intelligent waiver in regard to attending a hearing.

Subsection 3364.2(k)(3) is adopted to add language directing the ALJ to put testimony on the record from the person who contacted the inmate at their cell regarding any refusal or inability to attend a

hearing. This language and procedure was inadvertently omitted from the original draft, but critically important after creating all the other procedural due process protections in order to make a record of what has transpired.

Existing subsection 3364.2(l) is amended to renumber existing text language and to relocate it under 3364.2(n), in order to accommodate the new text language under 3364.2(l) and 3364.2(m).

New subsection 3364.2(l) is adopted to add language addressing the desired protocol for renewal interviews between the patient and the doctor. This subsection is added to address the issue of how and when telepsychiatry (video conference) might be used in the renewal process for involuntary medication. The Department has received feedback from ALJs and inmate attorneys indicating a general disfavor for the use of tele-psychiatry to interview a patient, thus this subsection suggests that renewal interviews be conducted in person, but allows for use of telepsychiatry if not feasible to interview in person.

New subsection 3364.2(m) is adopted to add language to include the creation of new form CDCR MH-7369 (09/14), Penal Code Section 2602 Reconsideration, which is incorporated by reference into the regulation text. This new form is necessary for use as an inmate's application for the reconsideration process, under PC 2602(c)(10). In addition, instructions are included on how to process the form, and the timeframe for submittal. This subsection is added in response to a public comment.

All written comments must be received by 5:00 p.m. on December 8, 2014. Please limit your comments to the modifications proposed here. Submit comments to Timothy M. Lockwood, Chief, Regulation and Policy Management Branch, Department of Corrections and Rehabilitation, P.O. Box 942883, Sacramento, CA, 94283-0001; by fax to (916) 324-6075; or by e-mail to rpmb@cdcr.ca.gov before the close of the public comment period.

Original signed by:

TIMOTHY M. LOCKWOOD, Chief
Regulation and Policy Management Branch
Department of Corrections and Rehabilitation

Attachments